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No. 05-___

IN THE

Supreme Court of the United States

Douglas Edwin Pierce,

Petitioner,

v.

L.E. Fleming, Warden, Federal Medical Center Fort Worth.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court resolve the three-way conflict among seven circuits over whether a federal judge can require a defendant to serve a term of imprisonment consecutively to another sentence that has not yet been imposed?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Douglas Edwin Pierce respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW AND JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-3a) and the district court's order (Pet. App. 4a-5a) are unpublished. The court of appeals issued its opinion on October 14, 2005. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

18 U.S.C. 3584(a) provides:

> If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

STATEMENT

This case involves a recurring question in federal criminal sentencing: whether a district court may order that its sentence be served consecutively to a state sentence that has not yet been imposed. As the government has recently acknowledged in its brief in opposition to the petition for

certiorari in *Cox* v. *United States*, No. 05-454, this question is the subject of a broad and long-standing division among the courts of appeals. See *Cox* BIO 5. In this case, the Fifth Circuit held that a district court has the power to order that its sentence be served consecutively to a sentence that had not yet been imposed in state court.

1. The sentencing question arises in this case because petitioner was charged in both state and federal court for crimes arising out of the operation of a methamphetamine lab. The relevant facts are undisputed. On January 25, 2000, petitioner was arrested by local police in Hill County, Texas, and charged with the state law crimes of "Engaging in Organized Crime" and "Conspiracy to Manufacture Methamphetamine."[1] Petitioner was initially released on bond, but after he failed to appear for a hearing he was re-arrested and charged with bail-jumping.

While awaiting his state trial, petitioner was charged by federal prosecutors with conspiracy to manufacture methamphetamine in violation of 21 U.S.C. 841 and 846. Petitioner pled guilty to the federal charges and, on January 3, 2002, was sentenced to seventy-eight months' imprisonment. The federal district court did not specify whether the sentence was to be served consecutive to or concurrent with any future sentence from the pending state prosecution. See Judgment In A Criminal Case, No. W-01-CR-006(01) (W.D. Tex. Jan. 7, 2002). Accordingly, petitioner was committed to the custody of the U.S. Bureau of Prisons (BOP) to begin serving his federal sentence.

Subsequently, petitioner entered into a plea agreement with state prosecutors in which he agreed to plead no contest to the bail-jumping charge. In exchange, the state drug

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[1] The underlying facts of this case were not discussed in the opinion of either the district court or the court of appeals below. However, the basic facts are undisputed and are described in the government's brief before the Fifth Circuit. See Resp. C.A. Br. 2-5.

charges against him would be dropped and the state court would order that petitioner's sentence be served concurrently with his previously imposed federal sentence. Pursuant to this agreement, on February 21, 2002, petitioner was sentenced in state court to a term of imprisonment of "three years with the imposition of the sentence concurrent with any federal sentence that you may have already received, plus court costs." Excerpt of Proceedings, Judge's Order, *State of Texas* v. *Pierce*, No. 31,752 (Dist. Ct., 66th Jud. Dist., Tex. Feb. 21, 2002). See also Judgment 3 (indicating that sentence was "to run concurrent with federal sentence"). Petitioner was then remanded to state custody, where he served out his state sentence.

Upon his parole from state prison on June 28, 2002,[2] petitioner was immediately taken into federal custody. Initially, the BOP credited petitioner with the time served in state custody under his state sentence (652 days), consistent with the state court's judgment. See Petr. C.A. Br. Ex. B (BOP Sentence Monitoring report, Oct. 23, 2002). However, in January 2003, the BOP reversed itself. The BOP informed petitioner that he would not be given credit for the time spent under his state sentence and, instead, would be credited for only 33 days. *Id.* Ex. C, F. Petitioner filed an internal grievance contesting the change. In response, prison officials informed petitioner that on May 29, 2003, officials contacted the federal district court "to determine if the Court had any objections to your federal sentence running concurrent with your state sentence." *Id.* Ex. E. Officials reported that on "June 22, 2003, a letter was received from the U.S. District Court for the Western District of Texas stating that it was the Court's wish for your federal sentence to run consecutive to your state sentence." *Ibid.* Relying on a BOP manual, officials had recalculated petitioner's sentence, providing credit only for the small portion of petitioner's time in pre-

[2] Petitioner was given credit toward his state sentence for some of the time served prior to sentencing.

trial federal detention that was not credited to his state sentence. *Ibid.* (citing Bureau of Prisons, *Sentence Computation Manual (CCCA of 1984)*, § 5880.28). Petitioner appealed this determination through the BOP grievance process without success.

On May 29, 2005, petitioner asked the state court to revise its judgment to give effect to its original intent and to the plea agreement. Petitioner explained that "the only way for me to receive the benefit of the plea agreement made in your Court is for you to vacate my original sentence" because in that case the BOP would, under its regulations, credit the time served in state custody toward the federal sentence. Request to vacate judgment, *State of Texas* v. *Pierce*, No. 31,752 (May 29, 2005). On June 6, 2005, the state court responded, indicating that it "hereby reaffirms said granting, of a concurrent sentence in your above referenced cause #31,752 and any federal sentence you are serving." Advisal Letter (June 6, 2005). However, the court also indicated that it was powerless to make its intent effective in light of the BOP's actions: "This Court has no jurisdiction to alter its Order as more than 30 days have expired since judgment herein was signed, and it has no jurisdiction over the federal judicial system." *Ibid.*

2. On May 10, 2004, petitioner filed this action, seeking a writ of habeas corpus pursuant to 28 U.S.C. 2241. Petitioner argued, among other things, that under 18 U.S.C. 3584(a), the federal sentencing court lacked the legal authority to make his federal sentence run consecutive to a state sentence that had not yet been imposed. That statute provides in relevant part that "[i]f multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively." Petitioner argued that the necessary implication of this provision was that a sentencing court has discretion to decide whether its sentence is to be concurrent or consecutive only if it is imposing both

sentences at the same time or if the first sentence has already been imposed. When the sentences are imposed at different times, petitioner contended, the statute places the decision of whether to make the sentences consecutive in the hands of the second court, not the first.

Respondent moved to dismiss, arguing that under Fifth Circuit precedent, the district court clearly had discretion to make its sentence run consecutive to any subsequent state sentence. The district court agreed, granting summary judgment in favor of respondent and adopting by reference the reasons stated in respondent's motion to dismiss. Pet. App. 4a.

On appeal, the Fifth Circuit affirmed. Pet. App. 2a. Citing 18 U.S.C. 3584(a) and settled circuit precedent, the court held that the "sentencing court had the discretion to order that a federal term of imprisonment run either consecutively to or concurrently with an anticipated, but not yet imposed, state sentence." Pet. App. 2a (citing *United States* v. *Brown*, 920 F.2d 1212, 1217 (CA5 1991)).

This petition followed.

REASONS FOR GRANTING THE WRIT

This case presents the same question as the pending petition in *Cox* v. *United States*, No. 05-454. In its brief in opposition in *Cox*, the government has conceded that "the courts of appeals disagree about whether a federal court has the authority to direct that a sentence be served consecutively to a yet-to-be imposed state sentence." *Cox* BIO 5. In particular, the government acknowledges that the Fifth, Eighth, Tenth, and Eleventh Circuits have held that district courts have such authority, while the Sixth, Seventh and Ninth Circuits have held that they do not. *Ibid.* The division has endured for more than a decade, persistently resulting in dramatically disparate sentences for similarly situated defendants across the nation. The only reasons proffered by the government in *Cox* for denying certiorari to resolve this entrenched circuit split are the government's belief that

resolution of the split "is unnecessary," *id.* 6, and its assertion that *Cox* "is not a suitable vehicle to resolve the conflict," *id.* 8. As discussed below, this case illustrates why the government's first objection is unfounded. Moreover, this case presents none of the vehicle problems that purportedly exist in *Cox* and the three previous petitions in which this Court has been presented with the question – all of which the government opposed on the ground that the particular cases presented poor vehicles. Accordingly, the petitions in both this case and *Cox* should be granted and the cases consolidated for argument.[3]

The government has never disputed that the question presented in this case and *Cox* is of recurring importance in numerous cases given the frequency with which defendants are charged with both state and federal crimes arising out of the same or related incidents. This case is typical: petitioner's involvement in the manufacturing of methamphetamine resulted in his indictment by both state and federal prosecutors, inevitably giving rise to the question of which court would control whether the state and federal sentences would run consecutively or concurrently to one another. The depth and duration of the circuit split, discussed below, arises precisely because the question is of such recurring importance.

The need for a clear and simple federal rule to resolve this question is evident. The fact that the question currently stands unresolved creates recurring conflicts between different sentencing courts and, frequently, between state and federal judges. While neither state legislatures nor Congress have the power to control the other's sentencing practices, Congress sought to resolve the potential for conflict by enacting 18 U.S.C. 3584(a). However, the efficacy of that solution has been substantially diminished by the division among the courts of appeals over the meaning of that

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[3] Because the petitioners in both cases are represented by the same counsel, the cases can be efficiently consolidated.